(2)

No. 03-1252

Supreme Court, U.S.
FILED
APR - 1 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DICK CORPORATION and GE SUPPLY COMPANY,

Petitioners,

v.

MELLON BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

ANDREW P. BROZMAN
Counsel of Record
JENNIFER C. DEMARCO
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

Attorneys for Respondent

186741

CP
BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

1. May a "trustee" in a chapter 11 case recover avoidable transfers "for the benefit of the estate" under Section 550(a) of the Bankruptcy Code when the proceeds of those recoveries will be distributed by the estate to a single class of creditors in accordance with the priorities of the Bankruptcy Code and prior, non-appealable orders of the court?

The questions presented by the Petitioners are either: (a) concluded finally by the prior decision of the Seventh Circuit, *In re Qualitech Steel Corp.*, 276 F.3d 245 (7th Cir. 2001) or other final, non-appealable orders that determined, for better or for worse, that the Respondent properly stands in the shoes of the "trustee"; or (b) comprise factual disagreements with prior decisions of the lower courts as to whether benefits to the estate had been conferred by the Respondent. In either event, none of the questions posed by the Petitioners is either the subject of the decision below or preserved for further review.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent makes the following disclosures:

Mellon Bank, N.A. is the collateral agent for the following prepetition senior lenders to Qualitech Steel Corporation:

Bank Austria Creditanstalt
Bank of America
Banque Nationale de Paris (nka BNP Paribas)
Comerica Bank
Harris Trust and Savings Bank
Kreditanstalt für Wiederaufbau
LaSalle Bank, N.A.
Mellon Bank, N.A.
National City Bank, Indiana
The Sanwa Bank, Limited
Westdeutsche Landesbank Girozentrale
Keybank Corporation
Credit Suisse/First Boston
GATX Capital Corp.

Mellon Bank, N.A. is a subsidiary of Mellon Financial Corporation, which is publicly traded.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
1. The Decision of the Seventh Circuit	1
2. The Factual Context	2
Reasons for Denying the Petition for a Writ	7
I. There Is No Conflict Between *Qualitech II* and the Precise Terms of Section 550(a) of the Bankruptcy Code. As a Result, There Is No Fundamental Issue of Which this Court Must Take Cognizance.	8
II. For the Same Reasons, the Decision Does Not Conflict With, or Presume the Resolution of the Issue Reserved in, *Hartford Underwriters*.	10
III. *Qualitech II* Works No Variance in the Fundamental Principles Upon Which Avoidance Claims Are Predicated.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases

Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group), 66 F.3d 1436 (6th Cir. 1995) 11

Commodore Electronics Ltd. v. Gould (In re Commodore Int'l Ltd.), 262 F.3d 96 (2d Cir. 2001) 11

Hartford Underwriters Inc. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 10, 11, 12

Mellon Bank, N.A. v. Dick Corp., 351 F.3d 290 (7th Cir. 2003) ..... *passim*

Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003) 11-12

P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.), 140 F.3d 1111 (7th Cir. 1998) 9-10

In re Qualitech Steel Corp., 276 F.3d 245 (7th Cir. 2001) ..... *passim*

Cited Authorities

Page

Statutes

11 U.S.C. § 364 3

11 U.S.C. § 502 7

11 U.S.C. § 503 7

11 U.S.C. § 506 .....4, 10, 11, 12

11 U.S.C. § 510 7

11 U.S.C. § 550 ..... *passim*

11 U.S.C. § 1129 7

STATEMENT OF THE CASE

1. *The Decision of the Seventh Circuit*

The sole issue resolved by the Court of Appeals in *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 291 (7th Cir. 2003) ("*Qualitech II*") was that a suit brought on behalf of an estate satisfied the Section 550(a) rubric that avoidance claims be recovered "for the benefit of the estate" even though, by reason of statutory priorities, the proceeds would be distributed only to one class of creditors.

The Seventh Circuit did not adjudicate the propriety of the bankruptcy judge's decision to afford the Senior Lenders a replacement lien in avoidance recoveries pursuant to its order dated May 13, 1999, approving debtor-in-possession financing (the "Financing Order"). The Petitioners never appealed from any provision of the Financing Order and the Court of Appeals already had held the time of the Official Committee of Unsecured Creditors to do so later to be "long past." *In re Qualitech Steel Corp.*, 276 F.3d 245, 248 (7th Cir. 2001) ("*Qualitech I*").

The Court of Appeals similarly was not called upon to hold that the bankruptcy court properly afforded Mellon Bank, N.A., as collateral agent for the Senior Lenders ("Mellon Bank"), the status of a "trustee" to pursue avoidance claims on behalf of the estate by reason of its authorization order dated June 8, 2000 and its replacement lien order dated March 14, 2000. No party appealed the former and the latter was appealed and decided finally and adversely to the Petitioners' position in *Qualitech I*.

2. *The Factual Context*

"Qualitech Steel Corporation had a short, unhappy, and expensive life." *Qualitech I*, 276 F.3d at 246. Qualitech Steel Corporation ("Qualitech") was a start up venture designed to construct a state of the art, special bar quality steel "mini-mill" and a new technology iron carbide plant, the product of which was meant to fuel the mini-mill at reduced costs. The company was capitalized by a substantial amount of private equity, institutional and governmental-sponsored bonds and a senior secured credit facility extended by a group of lenders (the "Senior Lenders") as to which Mellon Bank served as collateral agent. The total capitalization approximated $400 million.

Before either the mini-mill or the iron carbide plant were complete and operational, Qualitech had exhausted its capital resources. Indeed, just prior to its formal descent into chapter 11, Qualitech was experiencing cash losses of approximately $10 million a month. *Qualitech I* at 246; App. 2. Management, unable to persuade any component of the capital structure to infuse more funds, determined that a chapter 11 filing, in which the business operations, limited as they were, could be preserved and sold as a going concern was in the best interests of the Qualitech commonweal. *Qualitech I* at 246.

To finance its loss operations until a sale in chapter 11, Qualitech and its parent company affiliated debtor (together, the "Debtors") negotiated with a sub-group of the Senior Lenders (the "DIP Lenders") debtor-in-possession financing in an amount of $30 million (the "DIP Facility"), the net amount of funds management estimated Qualitech would lose

before a sale could be effected.[1] *See Qualitech I* at 246-247; App. 11. Given the condition of the borrower, the DIP Lenders agreed to the DIP Facility only on the condition that they receive a "super priority" lien and administrative claim that subordinated the existing liens of the Senior Lenders on all of the assets of the Debtors. *Qualitech I* at 247; App. 11-12. Because it was apparent that the DIP Facility would create no new assets but only fund losses, the Senior Lenders were unwilling to consent to the "priming" lien of the DIP Lenders unless they were afforded "adequate protection" against any diminution of the value of their pre-petition collateral resulting from the subordination of their liens. App. 2-3.

By means of the Financing Order, the bankruptcy court both approved the DIP Facility under section 364(d)(1) of the Bankruptcy Code and granted the Senior Lenders adequate protection by means of "Replacement Liens", junior only to the liens of the DIP Lenders, on, among other things, the Debtors' post-petition assets, including on Avoidance Recovery Property. *See Qualitech I* at 247; App. 12-14. The bankruptcy court made a number of specific factual findings in support of the Financing Order, including that it is "*necessary and is in the best interests of the Debtors.*"[2] C.A. App. 51. Neither the Petitioners nor any other party-in-interest appealed the Financing Order or sought to stay it. *Qualitech I*, 276 F.3d at 247.

---

1. While the Petitioners assert that the post-petition financing arrangements were with the "Prepetition Senior Lenders" (Petition at 11), the DIP Lenders were comprised of some, but not all, of the Senior Lenders. *Qualitech I* at 247.

2. Contradicting Petitioners' assertion that the purpose of the DIP Facility was to allow the Debtors to continue to a sale "all for the benefit of these secured creditors." (Petition at 4).

By its terms, the DIP Facility was linked to a timely sale of the Debtors' business assets as a going concern. C.A. App. 107. The entry of the Financing Order evidenced the bankruptcy court's approval of the estates' business judgment that the component parts of the DIP Facility, the loss funding, the subordination of the Senior Lenders' liens, the Replacement Lien and the going concern sale, were in the best interests of the estates and their creditors. C.A. App. 43-71.

A going concern sale of the assets appurtenant to the operating businesses of the mini-mill and the iron carbide plant was put in motion by the Debtors and engendered great contest among factions of the unsecured creditors. Ultimately, that contest was resolved by the entry of an order of the bankruptcy court authorizing an auction of the business assets. App. 60. Insufficient bidding at the auction caused the Senior Lenders to "credit bid" $180 million of their approximately $265 million (plus other accrued costs and expenses) in claims. *Qualitech I* at 246-247. Of the $180 million, $30 million was used to retire the obligations to the DIP Lenders. *Qualitech I* at 247. The balance of the Senior Lenders' claims were deemed unsecured by operation of section 506(a) of the Bankruptcy Code, except to the extent of the value of the Replacement Liens. *See Qualitech I* at 247. The sale was approved (by the "Sale Order" dated August 13, 1999) and the Debtors' operating business assets were sold to entities designated by the Senior Lenders.[3] App. 15-16.

---

3. Contradicting Petitioners' unsupported assertion that "Mellon, on behalf of the Prepetition Lenders, . . . purchased substantially all of the Debtors' assets." (Petition at 5).

It was only by reason of the DIP Facility and its component Replacement Liens and embedded sale process that the Debtors were able to effect a going concern sale to the benefit of numerous estate constituencies, including most pertinently the unsecured creditors, they having received as a result the additional benefit in the form of a distribution of a $7.5 million note. App. 5.

After the sale, the Official Committee of Unsecured Creditors (the "Committee") sought an order from the bankruptcy court: (1) determining rights to the proceeds of Avoidance Recovery Property, asserting that the Replacement Lien did not attach to the Avoidance Recovery Property because, among other things, the collateral of the Senior Lenders had increased in value; and (2) permitting the Committee to prosecute avoidance claims on behalf of the estate or to convert the cases to ones under chapter 7. App. 16. Mellon Bank adduced evidence at the hearing establishing the diminution in value of its collateral. *See Qualitech I.* As the estimate of prospective Avoidance Recovery Property did not exceed that diminution in value, Mellon Bank also urged that neither the Committee nor a chapter 7 trustee had a realistic stake in the proceeds of those actions and, accordingly, were not the best parties to pursue them vigorously.

By order dated March 14, 2000 (the "Replacement Lien Order"), the bankruptcy court denied the Committee's motion and found the value of the Senior Lenders' collateral to have diminished by no less than $30 million as a consequence of the DIP Facility and the Debtors' loss operations. *See Qualitech I*; App. 2-3. The court also found that the Replacement Liens would attach to, among other things, the Avoidance Recovery Property, and fixed the liens

in an amount of not less than $30 million. App. 2-3. It was the Committee's appeal from this order that resulted in the decision in *Qualitech I.*

Prior to the date of the *Qualitech I* decision, Mellon Bank, with the stipulated consent of the Debtors, sought authority from the bankruptcy court to prosecute actions for Avoidance Recovery Property in the name of and on behalf of the Debtors' estates. The court granted that authority by order dated June 8, 2000 (the "Authorization Order") which, among other things, placed Mellon Bank in the shoes of the Debtors for the express purpose of prosecuting the actions and to recover them for the Debtors' estates.[4] C.A. App. 402. That order neither disabled the Debtors from bringing actions nor prevented Mellon Bank from eschewing the pursuit of certain actions. C.A. App. 399-404. The Authorization Order was entered by the court and has become a "final order" from which no party had appealed.

The actions against the Petitioners (the "Dick/GE Adversary") were two of many actions commenced by Mellon Bank with respect to Avoidance Recovery Property. They sought recovery of an aggregate of about $900 thousand. (Other actions included one ultimately settled before the date of the bankruptcy court's decision in the Dick/GE Adversary in the amount of $15 million and approved by the bankruptcy court by order dated April 27, 2001 as being "*in the best interests of the estates*." C.A. App. 664.)

---

4. Petitioners' assertion that the Authorization Order proposed to "assign" avoidance actions to the Senior Lenders is contrary to the provisions of the Authorization Order which contained no assignment. C.A. App. 399-404.

Incongruously, the bankruptcy court thereafter was persuaded by the Petitioners to dismiss the Dick/GE Adversary on the grounds that: (1) the Sale Order entered two years previously had deprived the court of subject matter jurisdiction in that it "sold" the Avoidance Recovery Actions to the purchaser of the business assets; and (2) that the recovery by Mellon Bank in the name of and on behalf of the estate did not constitute a recovery within the contemplation of section 550(a). On appeal by Mellon Bank, the district court reversed the first ground and sustained the second. The Court of Appeals overturned the district court finding no merit in either ground.

REASONS FOR DENYING THE PETITION FOR A WRIT

The issues Petitioners urge for review by this Court are ones that the Seventh Circuit did not address in *Qualitech II*. Their quarrel is not with that decision, which is wholly unremarkable in its holding, but with the variety of final orders and the earlier *Qualitech I* decision no longer susceptible to any review and outside the ambit of this petition.

All that is capable of contest here is the Court of Appeals' affirmation of prior decisional law, albeit it in the factually complex setting of the Qualitech failure. *Qualitech II* no more than agrees with the plain wording of section 550(a) that avoided transfers must be recovered "for the benefit of the estate," if at all. In posing the questions it uses to frame its decision, it does no more than state the obvious differentiation between *recovery by the estate* and *distribution by the estate* pursuant to statutory command or contractual enforcement. Each is required by the Bankruptcy Code (*compare* section 550 with sections 502, 503, 510(a) and 1129, for example)

but neither defines the other. All the Seventh Circuit held, in other words, was that one cannot define a recovery "by the estate" to vary by reason of which estate components may receive the proceeds under the statutory distributive scheme. The Court of Appeals specifically held (*Qualitech II,* 351 F.3d at 293 (App. 6)):

> Lest this way of resolving the issue be taken to assume that section 550(a) requires that some benefit flow to unsecured creditors, we add that the statute does not say this. Section 550(a) speaks of benefit to *the estate* — which in bankruptcy parlance denotes the set of all potentially interested parties — rather than to any particular class of creditors. What happens to recoveries that reach the estate's coffers depends on contractual and statutory requirements.

Because this holding perfectly comports with the language of section 550(a) and is not in conflict with the decisions of this Court or those of any other circuit, the issue is not appropriate for discretionary review.

I. There Is No Conflict Between *Qualitech II* and the Precise Terms of Section 550(a) of the Bankruptcy Code. As a Result, There Is No Fundamental Issue of Which this Court Must Take Cognizance.

The Petitioners are disgruntled because the bankruptcy court in the Financing Order, the Replacement Lien Order and the Authorization Order decided to give the Senior Lenders a lien on Avoidance Recovery Property and authority to pursue its recovery "in the name and for the benefit of the

estates." Those orders, and, as to the Replacement Lien Order, the decision in *Qualitech I* affirming it, are in the distant, non-appealable past.

The Petitioners incorrectly assert for their *certiorari* predicate that *Qualitech II* does violence to the plain language of section 550(a). That language — "the trustee may recover for the benefit of the estate" — embraces two distinct concepts: (1) the "trustee" may recover; and (2) for the benefit of "the estate." Yet, *Qualitech II* addresses only the latter portion, and does so in full precision with the language of the statute. It is the first part, the assertion by the Petitioners that a "secured creditor" is pursuing the recovery (*see, e.g.* Petition, Questions Presented Nos. 1 and 2), with which the Petitioners really take issue. But that issue previously was litigated to finality (either in the final bankruptcy court orders or by *Qualitech I*) and formed part of the immutable legal landscape providing background to the *Qualitech II* decision.

By reason of the historical inheritance of the position of "trustee" by Mellon Bank, an issue not involved in this appeal, the *Qualitech II* decision did not and could not pass upon the wisdom of that court-created lineage. Upon that historical predicate, the only question the decision addressed was "benefit to the estate" and the Court of Appeals neither ignored nor implied other terms to that statutory language. It merely recognized what other courts before it had done, namely, that the estate embraces a broad amalgam of interests, the rights of each to the distributions by the estate being dictated and varied by statute and contract. *P.A. Bergner &*

Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.), 140 F.3d 1111, 1118 (7th Cir. 1998).[5]

II. For the Same Reasons, the Decision Does Not Conflict With, or Presume the Resolution of the Issue Reserved in, *Hartford Underwriters.*

This Court's decision in *Hartford Underwriters Inc. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) very clearly determined: (1) that the judiciary is obliged to apply "plain" statutory language in accordance with its "precise terms;" and (2) the plain language of section 506(c) to permit only "the trustee" to surcharge collateral. Neither determination is implicated, let alone derogated, by the *Qualitech II* decision.

The Court of Appeals neither tortured nor imported implicit text into the "plain" language of section 550(a) when it determined that a recovery on behalf and into the "coffers" of the estate was "for the benefit of the estate." Rather, *it specifically declined to vary the plain language at the behest of the Petitioners* by refusing to substitute "unsecured creditors" where the statute read "estate." *Qualitech II*, 351 F.3d at 293 (App. 6).

---

5. Petitioners' suggestion that their petition should be granted because *Qualitech II* conflicts "with decisions of bankruptcy courts nationwide" (Petition at 11), is neither accurate nor compelling. Each of the few bankruptcy court cases collected at page 10 of the Petition involved either a purported transfer of the avoidance claims *to a party outside of the estate* or was an element of the creditor's pre-petition security interest. Even if pertinent, no circuit court has adopted the views in conflict with the holding of *Qualitech II*. At best, therefore, this issue is not yet ripe for consideration on this Petition.

So, too, did the circuit court not visit, even by analogy, the second determination reached in *Hartford Underwriters*, as the facts presented Mellon Bank already inserted into the shoes of the trustee by prior orders and decisions from which Petitioners took no appeal and by which they, and the circuit court, were bound. For that reason, in no sense did the Court of Appeals hold in *Qualitech II*, that, for purposes of section 550(a), "trustee" includes "or its authorized representative."[6]

Finally, the Seventh Circuit found it unnecessary to address the issue reserved in the footnote of the *Hartford Underwriters* decision, 530 U.S. at 13 n.5. The Court of Appeals specifically declined to consider whether derivative-type actions to recover avoidance property may be pursued over the opposition of the "trustee" or other estate fiduciaries. *Qualitech II*, 351 F.3d at 292 (App. 4). Indeed, it answered a settled question, namely, whether or not Mellon Bank got there improvidently, on this appeal it *was* the "trustee" pursuing the recoveries in the name and for the benefit of the estate.

In all events, the open question left by this Court in footnote 5 relates to the power of a bankruptcy court to substitute a party other than the trustee to effect section 506(c) surcharge claims. As noted by the Third Circuit in the *en banc Cybergenics* decision, *cf.*, *Official Committee of*

---

6. For the reasons expressed in many opinions of the various circuit courts, Mellon Bank agrees that such a reading of the statutory text is appropriate and desirable. *See Commodore Electronics Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 100 (2d Cir. 2001); *Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group)*, 66 F.3d 1436, 1446 (6th Cir. 1995). That being said, *Qualitech II* is not the case, if one is needed at all, to present the issue to this Court.

Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 559-70 (3d Cir. 2003) (*en banc*), the resolution of the section 506(a) question does not necessarily resolve that issue in relation to avoidance recoveries. Certainly, one would not reach out to the fact specific and somewhat *sui generis Qualitech* cases for the medium to alter the widely adopted current practice as it relates to avoidance actions.

Curiously, the Petitioners seem to concede that *Hartford Underwriters* has no application here unless "Mellon's assertion of the preference case was for its own benefit, ..." (Petition at 12-3.) Because that facially was not the case, the Petitioners elide the lack of conflict with *Hartford Underwriters* by suggesting the Court take on the *Cybergenics* decision. (*Id.* at 13.) However appealing that invitation may be in other circumstances, here *Qualitech II* placed no reliance on, nor would it be undermined by the reversal of, *Cybergenics* as the Seventh Circuit had no need to address more than the "benefit of the estate" issue.

III. *Qualitech II* Works No Variance in the Fundamental Principles Upon Which Avoidance Claims Are Predicated.

The Petitioners posit that the Seventh Circuit's decision will upset fundamental bankruptcy economics because preference recoveries are grounded upon the principle of equality of distribution among creditors of like priority. The predicate for this fear is not grounded in either the facts or legal holdings of *Qualitech II*, however as that decision neither frustrated the equality among unsecured creditors nor authorized any scheme by which unsecured creditors in future cases could be victimized.

Because there is nothing inherently improper about a debtor paying a just debt to a creditor, the law has always recognized that a preference may not be recovered for the benefit of "equity" or the original debtor-transferor. That would vitiate creditor equality and promote an unwarranted windfall to the equity. But, this is a very different proposition than the recovery by an estate for distribution to creditors of that estate, even if those distributees are not general unsecured creditors. Were it otherwise, the preferred creditors would retain a windfall, an inequality of distribution in comparison to the non-preferred creditors. The fact that the proceeds of those recoveries will be distributed by the estate to creditors with a more senior claim to them neither implicates inequality among creditors with *like priority* nor does it offend the policy of against an equity windfall.

The decision of the Court of Appeals left these principles wholly undisturbed and, because it determined that the recovery by the estate and subsequent distribution to creditors in accordance with statutory priority was proper, actually preserved equality of distribution among general unsecured creditors *inter se*.

The Petitioners' further suggestion that *Qualitech II* fosters or approves of lender liens on avoidance recovery property and, accordingly, ought be nipped in the bud before future damage to fundamental principles can be wreaked, is nowhere found in the decision. But, as early as two years prior in *Qualitech I*, the Court of Appeals observed that, whatever the wisdom of the avoidance recovery lien in the Financing Order, the Financing Order was entered in 1999 and was not contested by appeal or stay. Accordingly, the Seventh Circuit considered that issue foreclosed from its

consideration before the *Qualitech I* decision.[7] It certainly did not revive it for its holding in *Qualitech II*, other than to recognize that the bankruptcy court granted the Replacement Liens on Avoidance Recovery Property because it found it to be to the benefit of the estates to do so. *Qualitech II*, 351 F.3d at 293 (App. 4-5).

To the extent the Petitioners take issue with the idea that bankruptcy judges may impose DIP financing liens on avoidance recovery property (*see* Petition at 16-7 and App. 89-111), their fight is neither here nor with this Respondent. To the extent the Petitioners take issue with the finding that the DIP Facility, and its component Replacement Liens and embedded sale, benefited the estate, that issue of fact was determined by the bankruptcy court in 1999 upon an evidentiary record and in a final order from which no one appealed.

---

7. The court said:

> The only other assets in sight were the proceeds of preference-recovery actions (also known as avoidance actions). After notice and a hearing, the bankruptcy court approved debtor-in-possession (DIP) financing of $30 million, with super-security and an award of replacement security to the senior lenders, to the extent that this was necessary to maintain their financial position. No one appealed or sought a stay.
>
> * * *
>
> Perhaps the authorization of the DIP financing and the associated use of preference-recovery proceeds for "adequate security" was imprudent; . . . . But the time to make this point is long past. The bankruptcy judge *did* authorize financing with additional security to the original lenders.

Qualitech I, 276 F.3d at 247, 248 (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied as it raises neither a conflict with existing decisions of this Court, a conflict among the courts of appeal, nor an issue of fundamental significance to the bankruptcy laws.

Respectfully submitted,

ANDREW P. BROZMAN
Counsel of Record
JENNIFER C. DEMARCO
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 408-5100

Attorneys for Respondent

20. Although the Authorization Stipulation did not prevent or prohibit the Debtors from commencing any Avoidance Claim on their own behalf, it was recited in the Authorization Stipulation that the Debtors decided not to bring the avoidance action because they "determined that there is no equity in the Avoidance Claim for the Debtors or their Chapter 11 estates. *See* DC Exhibit 7 at 3.

21. The Court approved the Authorization Stipulation, after notice and hearing, on June 8, 2000.

22. On or about June 29, 2000 Mellon commenced five avoidance actions in the Court seeking preference recoveries under Bankruptcy Code Sections 547, 548 and 550 in the approximate amount of $1,781,000. *See* DC Exhibit 9. Included in these five actions is adversary no. 00-296 brought by Mellon Bank against Dick Corporation seeking recovery of alleged preferential transfers in the amount of $550,000. *See* DC Exhibit 9. Also included in these five actions is adversary no. 00-298 brought by Mellon Bank against G.E. Supply seeking recovery of alleged preterential transfers in the amount of $344,349.65. *See* DC Exhibit 9.

23. On or about August 9, 2000, Mellon commenced an additional proceeding against Mitsubishi International Corporation seeking a recovery of approximately $13.5 million. *See* DC Exhibit 9.

24. At the February 15th oral argument on the cross motions for summary judgment, counsel for Mellon admitted that the avoidance actions will not exceed 30 million dollars, thus preventing the estate from receiving any proceeds of the preference actions.

25 The Debtor's counsel's sole remaining task is to dismiss the bankruptcy petition after all remaining adversary proceedings have been completed. *See* McIlvain Dec., Exh. C, ¶¶ 5, 10. These adversary proceedings "involve disputes *among creditors over preferences,* warranties, cure payments and liens . . ." and Qualitech has no interest in these proceedings. McIlvain Dec., Exh. C, ¶¶ 10, 11 (emphasis added).

Conclusions of Law

The Defendants maintain that Mellon cannot bring the Avoidance Actions because the Avoidance Claims were part of the collateral that was included in the "Assets" that were sold on August 13, 1999. Consequently, the dispute here is between non-debtors which does not involve property of the Debtors' estates and therefore the Bankruptcy Court does not have subject matter jurisdiction over these actions.

In the alternative, the Defendants argue that, even if the Avoidance Claims were still property of the Debtors' estates, Mellon nevertheless lacks standing to bring these actions since only a trustee or debtor in possession is statutorily authorized to pursue such claims.

Finally, the Defendants argue that Mellon has no standing to pursue the Avoidance Actions because even the maximum potential recovery will not approach $30,000,000 (the amount of the Replacement Lien, to which the Avoidance Recovery Property will first be applied) and therefore, there will be no "benefit to the estate" as set forth in Bankruptcy Code §550.

Jurisdiction of the Bankruptcy Courts

1. The district courts have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11. *28 U.S.C. Section 1334(b).* Claims arising under, among other sections of the Bankruptcy Code, Section 547 are civil proceedings arising under title 11. *See, Wood v. Wood (In re Wood),* 825 F.2d 90, 97 (5th Cir. 1987).

2. Claims under Section 547 of the Bankruptcy Code are "core proceedings" within the contemplation of 28 U.S.C. Section 157(b). *Fleet Bank, N.A. v. Tierney, Kalis & Lucas (In re Patriot Ill. Corp.),* 181 B.R. 56, 60 (Bankr. C.D. III. 1994); *Narowetz Mechanical Contractors, Inc. v. Economy Mechanical Indus., Inc. (In re Narowetz Mechanical Contractors, Inc.),* 99 B.R. 850, 856 (N.D. III. 1989), and bankruptcy courts have jurisdiction to enter appropriate orders and judgments in such cases pursuant to 28 U.S.C. Section 158.

Summary Judgment Standard

3. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law." Fed. R. Civ. P.56(c).

4. The party moving for summary judgment bears the initial burden of demonstrating the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits if any," which demonstrates

the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

5. Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

6. To determine whether summary judgment is appropriate, the Court must determine whether any genuine issue of material facts exists. An issue is "material" only if the dispute might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, (1986).

7. An issue is "genuine" only if the evidence is such "that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

Property of the Estate –
Subject Matter Jurisdiction

8. Subject matter jurisdiction cannot be waived and may be contested by a party or raised *sua sponte* at any point in the proceeding. *Levin v. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois,* 74 F.3d 763, 766 (7th Cir. 1996) *cert. denied.*

9. The jurisdiction of the bankruptcy courts is derivative; it flows from the statutory grant of jurisdiction to the district courts. *In re K & L, Ltd.*, 741 F.2d 1023, 1028 (7th Cir. 1984). Thus, as set forth in 28 U.S.C. §157, a bankruptcy court's jurisdiction includes the power to adjudicate proceedings "arising in", "arising under" or "related to" a case under title 11. *Zerand-Bernal, Group,*

Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994); *In the Matter of Fedpak Systems, Inc.,* 80 F.3d 207, 213 (7th Cir. 1995).

10. A broad interpretation of the language in 28 U.S.C. §157 allows a bankruptcy court to have "related to" jurisdiction over a proceeding whenever the proceeding "could conceivably have any effect on the [bankruptcy] estate". *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984).

11. The Seventh Circuit's view of a bankruptcy court's jurisdiction is a bit more limited: a case is "related" to a bankruptcy when the dispute "affects the amount of property for distribution [i.e. the debtor's estate] or the allocation of property among creditors". "Bankruptcy court jurisdiction does not follow . . . property [that is sold]"; rather, its jurisdiction "lapses when property leaves the estate", *Elscint, Inc. v. First Wisconsin Financial Corp.* (In the Matter of Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987). *Fedpak,* 80 F.3d at 214. Therefore, a bankruptcy court does not have jurisdiction over an internecine conflict between two creditors, once all disputes about their stakes in the bankrupt's property have been resolved. *Xonics,* 813 F.2d at 131.

12. A proceeding where the property at issue was no longer part of the bankruptcy estate and a determination of rights to such property would not affect any dispute by creditors over property that *was* part of the estate was dismissed because it did not fall within the bankruptcy court's "related to" jurisdiction under 28 U.S.C. §157(a) and §1334(b). *Fedpak,* 80 F.3d at 213.[3]

---

[3] In *Fedpak,* the Bankruptcy Court determined that a certain pre-petition agreement with respect to the debtor's manufacture of frozen

(Continued on following page)

13. To determine here whether the property which was sold on August 13, 1999 (and therefore left the estate) includes the property which is the subject of the adversary proceedings here (i.e. recovery from preference claims of the debtor), one need look no further than the Sale Order and the Final Financing Order. The Sale Order defines the property that was sold to Qualitech Steel SBQ, LLC and Qualitech Steel Iron Carbide Corporation, the designees of the Prepetition Lenders, as "Assets" which, in turn were defined in a footnote as "all of the Debtors' right, title and interests in and to the Collateral described by and contained in the Final Financing Order". The Final Financing Order and the Credit Agreement attached thereto define "Collateral" to include "Avoidance Claims", which are further defined as "any claim either of the Borrower (Qualitech Steel Corporation) or the Parent (Qualitech Steel Holdings Corp.) to avoid a transfer by either of the Borrower or the Parent under the Bankruptcy Code, including, without limitation, any claim for avoidance . . .

---

yogurt dispensing machines was valid. In enforcing the agreement, the Bankruptcy Court determined that the nondebtor party to the agreement (Jones) was entitled to the patent and know-how license to manufacture the machines. Later, the debtor-in-possession sold its assets, including its intellectual property rights, to Polar Express. Thereafter the debtor-in-possession, at the request of Polar Express, sought clarification from the Bankruptcy Court with respect to its earlier findings, and the respective rights of Polar Express and Jones in the intellectual property. The Bankruptcy Court issued its "clarification order", but the District Court on appeal, and the Seventh Circuit Court of Appeals affirming, determined that, because the relief sought was with respect to property (i.e. the intellectual property) that had been sold, that property "passed outside of [the] court's control when [it] was sold . . . " and therefore, "the bankruptcy court [has] no jurisdiction to determine rights to the property". *Fedpak*, 80 F.3d at 214-215.

under sections . . . 547, 548 . . . 550 . . . of the Bankruptcy Code".

14. It is clear from the plain collective language of the Sale Order, the Final Financing Order, and the Credit Agreement, (all of which were drafted by the Prepetition Lenders' counsel) that the avoidance claims which are the subject matter of these adversaries were among the assets sold in August, 1999, and hence, once sold, this court's jurisdiction lapsed. A determination as to these avoidance claims which are no longer property of the estate will not affect the rights of any creditors with respect to property that still remains within the estate. The relief sought by the Plaintiff does not fall within this court's "related to" jurisdiction under 28 U.S.C: §157(a) and §1334(b), and therefore, the Court concludes that summary judgment in favor of the Defendants is appropriate.

Standing

15. Even if this Court were to conclude that the avoidance claims were not among the assets that were sold in August, 1999, and hence, were still property of the estate over which this court could exercise its subject matter jurisdiction, other obstacles prevent the Plaintiff from pursuing those claims in this court.

16. Sections 547 and 548 of the Bankruptcy Code give the trustee the power to bring preference and avoidance actions. Section 1107(a) gives the debtor-in-possession similar power. 11 U.S.C. §§ 547, 548 and 1107(a). The purpose behind consolidating in the trustee or the debtor in possession the singular power to pursue avoidance claims on behalf of the estate arises both because: the Bankruptcy Code envisions the broad consolidation of all

tangible and intangible property in which the creditors as a whole have an interest as "property of the estate"; and it is necessary to avoid a loss of orderly process through the individual pursuit of claims by commonly aggrieved creditors. *Cf. In re Carbide Cutoff, Inc.* 703 F.2d 259, 264 (7th Cir. 1983).

17. Additional statutory authority exists that allows one other than a trustee or a debtor in possession to pursue a preference claim. Bankruptcy Code §1123(b)(3) provides that *a chapter 11 plan* may provide for the "settlement or adjustment of any claim or interest belonging to the debtor or to the estate" or "the retention and enforcement . . . by a *representative of the estate* appointed for such purpose, of any such claim or interest". (emphasis added).

18. Even in the absence of statutory authority, many courts have found "an implied but qualified right" for *creditors' committees* to bring adversary proceedings. *In re STN Enterprises, Inc.* 779 F.2d 901, 904 (2nd Cir. 1985); *In re North Atlantic Millwork Corp.,* 155 B.R. 271, 281 (Bankr. D. Mass. 1993).

19. Finally, there are narrow circumstances where a *creditor* may bring adversary proceedings. One such case is where a trustee has stipulated to the prosecution of estate actions by a creditor on behalf of the estate, and the court has approved that stipulation, the creditor has standing to bring suit to recover estate claims. *Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.),* 199 F.3d 1029, 1031 (9th Cir. 1999). While it is true that "[N]othing in the Bankruptcy Code dictates that a trustee cannot authorize a creditor to litigate an avoidance action on the trustee's behalf", *McCarthy v. Navistar Financial Corp.*

(In re Vogel Van & Storage, Inc.), 210 B.R. 27, 32 (N.D.N.Y. 1997), it is equally clear that the power to bring such claims may be transferred to a creditor either pursuant to a plan of reorganization under Section 1123 or outside of a chapter 11 plan *when the creditor is pursuing interests common to all creditors. Ducker Spradling & Metzger v. Baum Trust (In re P.R.T.C, Inc.),* 177 F.3d 774, 781 (9th Cir. 1999), *(emphasis added) citing Briggs v. Kent (In re Professional Inv. Properties of Am.),* 955 F.2d 623, 626 (9th Cir. 1992).

20. *Assuming that the Avoidance Recovery Property is still property of the estate,* and *further assuming* that this Court has jurisdiction to hear these avoidance actions and that these claims were not assigned or transferred, but merely are claims that the Plaintiff is pursuing on the Debtors' behalf, the Plaintiff still needs to show whether it is "pursuing interests common to all creditors".

21 Whether analyzed under §1123 (where the party bringing the action does so under a confirmed plan of reorganization as the "representative of the estate") or under §550 (which allows recovery of an avoided transfer "for the benefit of the estate"), a common theme running through cases under both sections is the impact, direct or indirect, the recovery will have upon prepetition unsecured creditors of the estate.[4]

---

[4] Although this case does not involve a confirmed plan of reorganization, (and therefore § 1123 presumably doesn't apply), the cases decided under § 1123 discuss the "representative of the estate" requirement and ultimately focus on "whether the appointed representative's recovery would benefit the estate". *In re North Atlantic Millwork*

(Continued on following page)

"Representative of the estate" under §1123

22. In *In re North Atlantic Millwork Corp.*, 155 B.R. 271 (Bankr. D. Mass. 1993), a post petition financing and cash collateral order granted to the chapter 11 debtor's prepetition lender a first lien in all existing and after acquired property, including all property recovered by the debtor as a result of actions successfully maintained under Bankruptcy Code Sections 543, 550 and 551. In the wake of an impending threat to either convert the case to one under chapter 7 or to appoint a chapter 11 trustee, the Creditors' Committee and the Debtor filed a joint motion to sell all the debtor's assets free and clear of liens. The asset purchase agreement drafted in conjunction with the sale defined "purchased assets" to include Section 547, 548 and 550-avoidance claims. The sale was approved and the sale order authorized the debtor to transfer to the purchaser all causes of action, including the avoidance claims. The purchaser was authorized to bring the avoidance claims even if the case converted to a chapter 7. The purchaser agreed to execute in favor of the debtor a promissory note not to exceed $125,000, plus accrued interest, which would be assigned to the Committee for distribution to the debtor's unsecured creditors.

Even though the purchaser was authorized to bring the avoidance actions not under a confirmed plan pursuant to §1123 but rather pursuant to an order approving the sale of the debtor's assets, the court nevertheless

---

Corp., 155 B.R. 271, 281 (Bankr. D. Mass. 1993). Therefore, although not dispositive. the cases analyzed under § 1123 are instructive.

analyzed the grant of authority under the requirements of §1123, focusing on the second required element of whether the purchaser was "a representative of the estate". There, the court noted that such inquiry starts by "focusing on whether the appointed representative's recovery would benefit the estate". *North Atlantic Millwork,* 155 B.R. at 281. A "benefit" could be indirect – such as recoveries that increase the value of ownership rights that the unsecured creditors have in the debtor's successor. See also, *In re Trans World Airlines, Inc. v. Travellers International AG,* 163 B.R. 964, 973 (Bankr. D. Del. 1994), *see, infra* p. 21-22. However, the *North Atlantic Millwork* court was unable to find even an indirect benefit. Not even the $125,000 promissory note qualified as a benefit to the estate since no payments were due until 1994, and since that sum to be paid to unsecured creditors was neither guaranteed nor secured by collateral. *North Atlantic Millwork,* 155 B.R. at 283. The defendants' motions to dismiss were granted.[5]

23. Conversely, where, under a confirmed plan, the recovery from avoidance actions was to be paid to administrative claimants, thereby enabling the estate to have more funds available to pay other unsecured creditors, this

[5] The *North Atlantic Millwork* case also discussed whether the avoidance claims were "transferred" or inappropriately "assigned" (via sale order instead of chapter 11 plan), and whether the failure of the sale notice to set forth information regarding the transfers of the avoidance claims was in error. Here, there is no assignment of the avoidance claims, but, as the Plaintiff alleges (assuming that the avoidance claims are still property of the estate), it is merely the party designated by the debtor and approved by the Court to pursue the avoidance claims on the debtors' behalf. Nevertheless *North Atlantic Millwork* provides a pertinent discussion with respect to the definition of "benefit to the estate" under § 1123.

potential indirect benefit was found sufficient to fulfill the "representative of the estate" requirement under §1123. Hence, the defendant's motion to dismiss was denied on appeal, and the representative was allowed to proceed with prosecution of the avoidance actions. *In re Sweetwater,* 884 F.2d 1323, 1327 (10th Cir. 1989). Pertinent in the Tenth Circuit's discussion is this observation:

> "The primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate, and particularly, *the debtor's unsecured creditors".*

Sweetwater, 884 F.2d at 1327 (emphasis added; citations omitted).

The *Sweetwater* court reiterated the purpose behind the avoidance powers under §547 and noted:

> When a debtor corporation has made a transfer of its assets which results in the preference of one or more creditors over others, the purpose of an action against those transferees is to return assets to the debtor's estate for equitable distribution to all creditors . . . [these cases] reaffirm the principle that post petition avoidance actions should be pursued in a manner that will satisfy the basic bankruptcy purpose of treating all similarly situated creditors alike; one or more similarly situated creditors should not be able to pursue an avoidance action for their exclusive benefit . . .

Sweetwater, 884 F.2d at 1327-28.

Benefit to the Estate under §550

24. Once a transfer has been determined to be an avoidance preference under §547 or an avoidance fraudulent transfer under §548, Section 550 (a) of the Bankruptcy Code determines the parties that are liable and to whom a debtor or trustee can look for recovery of such avoided transfers. However, that section conditions recovery on "benefit to the estate", similar to the analysis discussed earlier. Section 550 states: "[ex]cept as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, ***for the benefit of the estate***, the property transferred . . ." 11 U.S.C. §550(a) (emphasis added).

25. It is axiomatic, as well as statutory, that the recovery of preference claims cannot be accomplished unless such recovery is for the "benefit of the estate." *11 U.S.C. Section 550(a); P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.),* 140 F.3d 1111, 1118 (7th Cir. 1998). The objective of the estate benefit requirement is to ensure that actions designed to return transfers from individual creditors who have been "preferred" over other creditors do not have the unintended effect of annulling a just obligation of the debtor to those creditors by benefitting the debtor "*alone.*" Bergner at 1118 *(emphasis supplied).* In other words, the idea is to equalize and enhance the potential for distributions through the estate in accordance with the priorities of the Bankruptcy Code or orders of the Bankruptcy Court and not to afford a windfall for the justly obligated debtor. *Acequia, Inc. v. Clinton (In re Acequia, Inc.),* 34 F.3d 800, 812 (9th Cir. 1994).

26. Like §1123, a "benefit" to the estate need not be direct to satisfy the requirement of §550; an indirect benefit suffices. *In re Trans World Airlines, Inc. v. Travellers International AG,* 163 BR. 964, 973 (Bankr. D. Del. 1994). In *Trans World Airlines,* the chapter 11 debtor brought a §547 avoidance action against Travellers International AG ("Travellers"). Travellers moved to dismiss, in part, on the basis that only the former CEO of the debtor, Carl Icahn, who made substantial loans to the debtor, and who was to be repaid in part, from preference recoveries, stood to benefit from any recovery and therefore, the action should be dismissed because it didn't benefit the estate as required under §550. The Court first noted that, although a comprehensive settlement agreement allowed the debtor to assign the avoidance claims to Icahn, they had not in fact been assigned. More importantly, the court noted that under the confirmed plan,[6] unsecured creditors, in full satisfaction of their claims, received a pro rata share of the principal amount of seven year notes and over 3 million shares of new preferred stock in the reorganized debtor. To the extent the avoidance action was successful, Icahn was to be repaid up to $13,000,000 of the recovery.

In finding an indirect benefit that satisfied the precepts of §550, the court denied the Traveller's motion to dismiss:

> TWA argues, and I agree, that the unsecured creditors will benefit from the enhanced value of reorganized TWA by reason of being shareholders

[6] Although the *Trans World Airlines* case had a confirmed chapter 11 plan (and therefore, could have been analyzed under § 1123), the court focused on the "for the benefit of the estate" language under §550.

> of the reorganized debtor. It is of little moment that the recovery may be immediately paid to Icahn. If a $13 million payment to Icahn does not come out of the recovery, then it will necessarily come out of other TWA assets. I also conclude that not only do the unsecured creditors benefit as shareholders, they benefit as noteholders. To the extent that the recovery will enhance the value of reorganized TWA, the noteholders, as well as other creditors of TWA, will benefit . . . [W]hile these benefits may not be "committed" to the creditors or be quantifiable as to them, the benefits are nevertheless real. More importantly, the benefit to the estate is quantifiable, and *the estate is the focus of §550(a), not individual creditors . . . The basis purpose of a recovery pursuant to §550(a) is to enlarge the estate for the benefit of creditors.*

Trans World Airlines, 163 B.R. at 973. (emphasis added).

27. In *Bergner,* the debtor was pursuing preference and setoff actions against a creditor when its chapter 11 plan was confirmed. Although the confirmed plan contained no specific language of which actions the debtor was going to pursue postconfirmation, the plan was clear that the bankruptcy court retained jurisdiction to hear actions that were pending when the disclosure statement was approved. Having determined that the confirmed plan did not prevent the pending preference action, the Seventh Circuit then analyzed whether the preference recovery would be for the benefit of the estate, a prerequisite to recovery under §550. The defendant argued that, recovery by the reorganized debtor (the plaintiff) would only benefit the new owners of the reorganized debtor and not "the estate".

The Seventh Circuit first reiterated that the benefit contemplated by §550 need not be "direct" and noted that the "benefit to the estate" requirement was interpreted broadly, permitting recovery even where it will not vary the fixed amount unsecured creditors are to receive under a confirmed plan. However, the Seventh Circuit continued:

> Here, we agree that recovery will benefit the owners of the reorganized Bergner. But who are they? Under the plan, 100% of the equity in Bergner was distributed to the holders of the Swiss bank group's approximately $300 million in undersecured claims, *who in exchange funded $25 million of the distribution to general unsecured creditors.* Recovery in this preference action will benefit the reorganized Bergner, as Bank One points out, which in turn will benefit the owners of reorganized Bergner – the largest creditor group of old Bergner. This is enough, in our view, to satisfy the requirements of § 550. *See In re Acequia, Inc.,* 34 F.3d at 811; *In re Trans World Airlines, Inc.,* 163. B.R. 964, 969-71 (Bankr. D. Del. 1994).
>
> (emphasis added).

In *Bergner,* the "bank group", in exchange for receiving 100% of the equity of the reorganized debtor, funded $25,000,000 for distribution to unsecured creditors. Even though the Bergner court interpreted the phrase "benefit to the estate" broadly, such phrase nevertheless connotes that prepetition unsecured creditors either directly or indirectly benefit from the preference recoveries, either through a direct participation in the preference recovery proceeds, through an enhanced value of their equity in a newly *reorganized* debtor, or through the freeing up of funds now available to them that otherwise would have

been paid to the party bringing the preference actions had no recovery been realized.[7]

28. Here, the Plaintiff argues that the requisite "benefit to the estate" was the $30,000,000 postpetition loan. That postpetition loan undoubtedly benefitted the debtor in possession, to the extent it prolonged plant operations in an attempt to increase the value of the debtors as a going concern. However, unlike the situations in either *Bergner* or *Trans World Airlines,* unsecured creditors in this case have received nothing. There was no plan. There was no reorganization, and unsecured creditors have no stake in the success of the reorganized debtor because there is no reorganized debtor. There was no fund established from which proceeds are to be distributed to unsecured creditors. As recovery of the avoidance claims will not reach the $30 million threshold, and the Prepetition Lenders will be the sole beneficiaries of the requested recoveries from Dick Corporation and GE Supply, bringing these action will not inure to the benefit of the estate.

---

[7] Although decided under §1123, *Winston & Strawn v. Kelly, et al (In re Churchfield Management & Investment Corp.),* 122 B.R. 76 (Bankr. N. D. Ill. 1990) affirms this view. There, the Bankruptcy Court noted: "Courts have held that so long as the *unsecured creditors* receive some benefit from the recovery of a preference, even if it is not an actual increase in the amount the creditors will receive, § 1123(b)(3)(B) will still apply." 122 B.R. at 82. Although at least one court has allowed recovery in a case where only the secured lender was to benefit, it was a case where the plan of reorganization provided for a distribution to unsecured creditors, and that distribution was largely possible only through the post petition advances made by the secured lender to the debtor. See, *In re Tennessee Wheel & Rubber Co.,* 64 B.R. 721, 726 (Bankr. M. D. Tenn. 1986).

29. There is no bankruptcy or reorganizational purpose to be served by permitting this action to go forward particularly where, as here, there is no plan, there will be no distribution to unsecured creditors and the bankruptcy case, upon conclusion of these preference actions, will be dismissed. "Where recovery will benefit an entity other that the estate, Section 550's requirement that recovery be for the benefit of the estate is not satisfied." *In re Huntsville Small Engines, Inc.*, 228 B.R. 5, 13 (Bankr. N. D. Ala.1998); *In re Metal Brokers International, Inc.*, 225 B. R. 920 (Bankr. E. D. Wis.1998); *See also In re Burlington Motor Holdings, Inc.*, 231 B.R. 874, 877 (Bankr. D.Del. 1999) (holding that successor corporation which had acquired all of the Chapter 11 debtors' assets lacked standing to bring preference actions, as "any recovery by the Successor Corporation is not for the benefit of the estate as required by §550(a).") *See also Congress Credit Corp. v. AJC Intern.*, 186 B.R. 555 (D.P.R. 1995) (finding no benefit to the estate and party asserting claims has no standing where party asserting preference action had a lien on the proceeds on the recovery of preference actions, requiring proceeds to go directly to that party and where unsecured creditors receive none of the proceeds).

30. Because the Plaintiff has failed to show that there is a genuine issue of material fact with respect to whether the Avoidance Claims are property of the estate, and whether the Plaintiff is entitled to recover the Avoidance Recovery Property under §550, the Court concludes that there is no genuine issue of material fact with respect to these issues, and therefore, summary judgment in favor of the Defendants is appropriate. Accordingly, the issues raised as to Section 547 liability need not be reached.

The appropriate summary judgment entry will follow.

DATE: AUG 06 2001

/s/ Anthony J. Metz, III
ANTHONY J. METZ, III,
Judge
United States
Bankruptcy Court

Distribution:

Andrew P. Brozman/Jennifer DeMarco,
Attorneys for Plaintiff
Charleyne L. Gabriel, Attorney for GE Supply
Martin Weis, Attorney for Dick Corporation
Kevin Dempsey, U.S. Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: Qualitech Steel Corporation Qualitech Steel Holdings	Case No. 99-3364-AJM-11 Case No. 99-3363-AJM-11 Jointly Administered Under 99-3364-AJM-11
Mellon Bank, N.A. as Collateral Agent for the Prepetition Senior Lenders, on behalf of Qualitech Steel Corporation, Plaintiff, vs. Dick Corporation, Defendant.	Adversary Proceeding No. 00-296
Mellon Bank, N.A. as Collateral Agent for the Prepetition Senior Lenders, Plaintiff, vs. GE Supply Company Defendant.	Adversary Proceeding No. 00-298

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The Court has entered its Findings of Fact and Conclusions of Law regarding the cross motions for summary judgment filed by the Plaintiff and the Defendants. The Court, having found no genuine issue of material fact with

respect to whether the Avoidance Claims were sold and are no longer property of the Debtors' estates and, in the alternative, (2) whether recovery from these avoidance actions is for the benefit of the estate as required under 11 U.S.C. § 550; and having found as a matter of law that the Avoidance Claims were sold on August 13, 1999, and therefore are no longer property of the estate, and further, in the alternative having found that recovery from these avoidance action [sic] do not meet "for the benefit of the estate" requirement under § 550;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT: Summary Judgment is entered in favor of the Defendants, GE Supply Company and Dick Corporation, and it is further ordered that

the Plaintiff's Motion for Summary Judgment is hereby DENIED.

DATE: AUG 06 2001

/s/ Anthony J. Metz, III
ANTHONY J. METZ, III,
Judge
United States
Bankruptcy Court

Distribution:

Andrew P. Brozman/Jennifer DeMarco,
Attorneys for Plaintiff
Charleyne L. Gabriel, Attorney for GE Supply
Martin Weis, Attorney for Dick Corporation
Kevin Dempsey, U.S. Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: Qualitech Steel Corporation Qualitech Steel Holdings	Case No. 99-3364-AJM-11 Case No. 99-3363-AJM-11 Jointly Administered Under 99-3364-AJM-11
Mellon Bank, N.A. as Collateral Agent for the Prepetition Senior Lenders, on behalf of Qualitech Steel Corporation, Plaintiff, vs. Dick Corporation, Defendant.	Adversary Proceeding No. 00-296
Mellon Bank, N.A. as Collateral Agent for the Prepetition Senior Lenders, Plaintiff, vs. GE Supply Company Defendant.	Adversary Proceeding No. 00-298

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff filed its Motion for Reconsideration of the Order Granting Defendants' Motions for Summary Judgment dated August 6, 2001. Hearing on the Plaintiff's

Motion and the Defendants' response was held on December 5, 2001 wherein Andrew Brozman and Jennifer DeMarco appeared for the Plaintiffs; Martin J. Weis appeared for Defendant Dick Corporation; Charleyne Gabriel appeared for Defendant GE Supply. The Court, after reviewing the record, and considering the arguments of counsel, now DENIES the Plaintiff's Motion for Reconsideration.

DATE: DEC 27 2001

/s/ Anthony J. Metz, III
ANTHONY J. METZ, III,
Judge
United States
Bankruptcy Court

Distribution:

Andrew P. Brozman/Jennifer DeMarco,
Attorneys for Plaintiff
Charleyne L. Gabriel, Attorney for GE Supply
Martin Weis, Attorney for Dick Corporation
Kevin Dempsey, U.S. Trustee

Local Bankruptcy Rules
United States Bankruptcy Court
District of Massachusetts

[SEAL]

March 31, 2003

Fifth Edition

United States Bankruptcy Court 1101 Thomas P. O'Neill, Jr. Federal Building 10 Causeway Street, Room 1101 Boston, Massachusetts 02222-1074 (617) 565-8950	United States Bankruptcy Court Divisional Office Harold Donohue Federal Courthouse 595 Main Street Worcester, Massachusetts 01608-2076 (508) 793-0518

* * *

RULE 4001-2. USE OF CASH COLLATERAL, OBTAINING CREDIT AND STIPULATIONS RELATING TO SAME

* * *

(c) Subject to section (d), the following provisions contained in an agreement between the debtor and the holder of a secured claim as to use of cash collateral, obtaining credit, or adequate protection, or any interim or final order approving or authorizing the use of cash collateral, obtaining credit, or adequate protection, shall be unenforceable:

(1) any acknowledgment of the validity, amount, perfection, priority, extent or enforceability of the secured claim, if the agreement or order purports to bind any party other than the debtor,

unless the agreement or order affords an objection period of not less than ninety (90) days after (I) for any party in interest, the entry of the order approving the agreement; (ii) for the creditors' committee, the entry of an order approving the employment of counsel to the creditors' committee; and (iii) for a Chapter 11 or Chapter 7 trustee, the entry of an order approving the employment of counsel to said Chapter 11 or Chapter 7 trustee;

(2) any waiver of defenses by the debtor or estate representative;

(3) any postpetition lien which purports to secure any claim of a secured creditor other than (I) a claim arising from postpetition advances which constitute an additional non-replacement extension of credit; or (ii) a claim representing the diminution in value of the secured claim after the commencement of the case;

(4) any grant of a security interest in avoidance power recoveries available to the trustee;

(5) any provision granting a creditor relief from the automatic stay without further order or hearing upon the breach of the cash collateral, adequate protection or postposition financing order or agreement; or

(6) any waiver by the debtor of the estate representative of rights provided by 11 U.S.C. § 506(c), in whole or in part.

(d) Notwithstanding section (c), the Court may order the enforcement of any terms and conditions on the use of cash collateral or obtaining credit, provided that [i] the proposed order or agreement specifically states that the proposed terms and conditions vary from the

requirements of section (c), and (ii) any such proposed terms and conditions are conspicuously and specifically set forth in the proposed agreement or order.

LOCAL RULES
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

(Effective February 1, 2001)
(Amended September 1, 2002 to add Rule 3007-1)

* * *

Rule 4001-2 Cash Collateral and Financing Orders

(a) *Motions.* Except as provided herein and elsewhere in these Rules, all cash collateral and financing requests under 11 U.S.C. §§ 363 and 364 shall be heard by motion filed pursuant to Fed.R.Bankr.P. 2002, 4001 and 9014 ("Financing Motions").

(i) *Provisions to be Highlighted.* All Financing Motions must (1) recite whether the proposed form of order and/or underlying cash collateral stipulation or loan agreement contains any provisions of the type indicated below, (2) identify the location of any such provision in the proposed form of order, cash collateral stipulation and/or loan agreement, and (3) the justification for the inclusion of such provision:

* * *

(D) Provisions that grant immediately to the prepetition secured creditor liens on the debtor's claims and causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548, and 549.

* * *

United States Bankruptcy Court
Northern District of Illinois

[SEAL]

Local Rules

Adopted June 1, 2003

* * *

RULE 4001-2

CASH COLLATERAL AND FINANCING ORDERS

A. Motions

(1) Except as provided in these Rules, all cash collateral and financing requests under §§363 and 364 of the Bankruptcy Code shall be heard by motion filed pursuant to Fed.R.Bankr.P. 2002, 4001 and 9014 ("Financing Motions").

(2) Provisions to be Highlighted. All Financing Motions must (a) recite whether the proposed form of order or underlying cash collateral stipulation or loan agreement contains any provision of the type indicated below, (b) identify the location of any such provision in the proposed form of order, cash collateral stipulation or loan agreement, and (c) state the justification for the inclusion of such provision:

* * *

(d) Provisions that immediately grant to the prepetition secured creditor liens on the debtor's claims and causes of action arising under §§544, 545, 547, 548, and 549 of the Bankruptcy Code.

* * *

(3) All Financing Motions shall also provide a summary of all provisions that must be highlighted under section (A)(2) of this Rule and a summary of the essential terms of the proposed use of cash collateral or financing, including the maximum borrowing available on a final basis, the interim borrowing limit, borrowing conditions, interest rate, maturity, events of default, use of funds limitations, and protections afforded under §§363 and 364 of the Bankruptcy Code.

* * *

(5) The court may deem unenforceable any provision not highlighted as required under section (A)(2) of this Rule.

B. Interim Relief

When Financing Motions are filed with the court on or shortly after the date of the entry of the order for relief, the court may grant interim relief pending review by the interested parties of the proposed debtor-in-possession financing arrangements. Such interim relief should only be granted to avoid immediate and irreparable harm to the estate pending a final hearing. In the absence of extraordinary circumstances, the court shall not approve interim financing orders that include any of the provisions previously identified in section (A)(2)(a) through (A)(2)(I) of this Rule.

* * *

Local Bankruptcy Rules, Forms and Procedures

United States Bankruptcy Court
for the Southern District of Ohio

Effective: January 1, 2004

* * *

4001-2 CASH COLLATERAL

(a) Motion. Except as provided herein and elsewhere in these Local Rules, in a chapter 11 case, all cash collateral and financing requests under §§ 363 and 364 of the Code shall be heard by motion filed pursuant to Rules 2002, 4001 and 9014. Stipulations or agreed orders regarding the use of cash collateral are subject to the provisions of this rule. A motion shall contain a description of the cash collateral to be used, sold, or leased; a description of the interest claimed by any other entity in the cash collateral; and the reasons for which the debtor seeks authorization to use, sell, or lease the cash collateral.

(1) Provisions to be Highlighted. A motion must (1) recite whether the proposed form of order and/or underlying cash collateral stipulation or loan agreement contains any provision of the type listed below, (2) identify and highlight the location of any such provision in the proposed form of order, cash collateral stipulation and/or loan agreement, and (3) set forth the justification for the inclusion of such provision. The provisions to be identified and highlighted are:

* * *

(F) Provisions that grant immediately to the prepetition secured creditor liens on the debtor's claims and causes of action arising under §§ 544, 545, 547, 548, and 549 of the Code.

* * *

(b) Interim Relief at Outset of Case. When a motion is filed with the court on or shortly after the date of the entry of the order for relief, the court may grant interim relief pending review of the proposed debtor-in-possession financing arrangements by the interested parties. Such interim relief is intended to avoid immediate and irreparable harm to the estate pending a final hearing. In the absence of extraordinary circumstances, the court will not approve interim financing orders that include any of the provisions previously identified in subsection (a)(1)(A) through (a)(1)(Q) above.

* * *

LOCAL BANKRUPTCY RULES
(Abridged Edition)

EFFECTIVE MAY 1, 2003

[SEAL]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Edward R. Roybal Federal Building
255 East Temple Street
Los Angeles, California 90012
(213) 894-3118

LOCAL BANKRUPTCY RULE 4001-2

CASH COLLATERAL STIPULATIONS

Every motion requesting the approval of a stipulation providing for the use of cash collateral (11 U.S.C. § 363(c)), or postpetition financing (11 U.S.C. § 364(c)), or both, shall be accompanied by court-approved form F 4001-2, Statement Pursuant to Local Bankruptcy Rule 4001-2, or a statement consistent with court-approved form F 4001-2.

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number

FOR COURT USE ONLY

Attorney for

UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA

In re:

CHAPTER ___
CASE NUMBER
DATE:
TIME:
Debtor. COURTROOM:

STATEMENT PURSUANT TO LOCAL BANKRUPTCY RULE 4001-2 (CASH COLLATERAL STIPULATIONS) (Secured Creditor: ___)

The Debtor, through a separately filed motion, has requested the approval of a stipulation providing for the use of cash collateral, or post-petition financing, or both. Attached to the motion as Exhibit ___ is a true and correct copy of the agreement for use of cash collateral or post-petition financing (the "Agreement"), which Agreement contains the following provisions:

Description of Provision	**Page No:**	**Line No. (If Applicable)**
☐ Cross-collateralization clauses	___	___
☐ Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the secured party's lien or debt	___	___
☐ Provisions or findings of fact that bind the estate or all parties in interest with		

respect to the relative priorities of the secured party's lien and liens held by persons who are not party to the stipulation, or which create a lien senior or equal to any existing lien ___ ___

☐ Waivers of 11 U.S.C. § 506(c), unless the waiver is effective only during the period in which the debtor is authorized to use cash collateral or borrow funds ___ ___

☐ Provisions that operate, as a practical matter, to divest the debtor in possession of any discretion in the formulation of a plan or administration of the estate or to limit access to the court to seek any relief under other applicable provision of law ___ ___

☐ Releases of liability for the creditor's alleged prepetition torts or breaches of contract ___ ___

☐ Waivers of avoidance actions arising under the Bankruptcy Code ___ ___

☐ Automatic relief from the automatic stay upon default, conversion to chapter 7, or appointment of a trustee ___ ___

☐ Waivers of procedural requirements, including those for foreclosure mandated under applicable non-bankruptcy law, and for perfection of replacement of liens	___	___
☐ Adequate protection provisions which create liens on claims for relief arising under 11 U.S.C. §§ 506(c), 544, 545, 547, 548 and 549	___	___
☐ Waivers, effective on default or expiration, of the debtor's right to move for a court order pursuant to 11 U.S.C. § 363(c)(2)(B) authorizing the use of cash collateral in the absence of the secured party's consent	___	___
☐ Provisions that grant a lien in an amount in excess of the dollar amount of cash collateral authorized under the applicable cash collateral order	___	___
☐ Provisions providing for the paying down of prepetition principal owed to a creditor	___	___
☐ Findings of fact on matters extraneous to the approval process	___	___

Dated:

Type Name *Signature*

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

824 MARKET STREET
WILMINGTON, DE 19801
(302) 573-6272

April 2, 1998

RE: First Day DIP Financing Orders

Dear Delaware Bankruptcy Counsel:

This is a follow-up to our session of March 11, 1998, where, at the prompting of Judge McKelvie, we discussed the need for improving the DIP financing orders being submitted at first day hearings. At that meeting, I gave a number of examples of provisions in several orders that I thought were either unnecessary, overreaching, or just plain wrong. In an effort to improve the content of first day DIP financing orders, I volunteered to comment in writing on the forms and to identify a number of terms or provisions in those orders that I believe should be avoided.

The following items, in no particular order of priority (except as to the first item), are not intended as immutable rules that I have on the matter, and certainly I have no authority to speak for the other judges on these matters, but I thought if we could shorten and eliminate some of the more objectionable features of proposed first day DIP financing orders, we could improve the first day proceeding. Needless to say, however, I think it is not practicable to have a blanket set of prohibitions given the numerous variations in the lending arrangements and the prepetition relationships between the debtor and the lender(s).

1. Many of the proposed orders are just too verbose and cover unnecessary matters. It is not necessary for the order to recite, even in summary fashion, the major provisions of the loan documents. For example, the following is a portion of a paragraph included in a recent DIP financing order, which obviously paraphrases what the loan document says on this particular matter:

> All advances and other extensions of credit and financial accom[m]odations shall be made solely on the terms and conditions of, and pursuant to, the Postpetition Loan Agreement and the other Postpetition Loan Documents, shall be evidenced by the Lenders' books and records, and shall be due and payable as provided in those agreements. The Lenders shall have no commitment to make any advances or other extensions of credit or financial accom[m]odations, and may, at any time, refuse to make advances, extensions of credit, or other financial accom[m]odations and may exercise their rights and remedies pursuant to the Prepetition Loan Agreement, the Postpetition Loan Agreement, and this Order upon an Event of Default as provided in the Postpetition Loan Agreement, including, without limitation, the incurrence by the Debtors of any liabilities above those approved in the "Budget" (as defined herein) appended hereto as Exhibit B.

If the DIP financing order authorizes the debtor to enter into the financing pursuant to the loan documents, it is simply not necessary for the order to restate a lot of the major terms of the financing. (Indeed, most of the above-quoted statement states the obvious for the type of loan transactions that we see on the first day.) The motion itself should spell out the terms that are essential to an understanding of the deal: maximum borrowing, interim

borrowing limit, borrowing conditions (e.g., percentage of inventory value), interest rate, maturity, events of default, use of funds limitations, collateral, and/or priority, etc.; but I do not see that it is necessary to get into a lot of details on these in the order. Of course, the order should identify those sections of the Bankruptcy Code designed to protect the estate and/or creditors generally that are being limited or abridged in any manner by the terms of the loan documents.

2. Do not incorporate into the order specific sections of the loan documents without a statement of the section's import. In a recent case the proposed order contained a decretal paragraph regarding events of default that specifically referenced about a dozen particular sections of the loan agreement and tied them into the issue covered by the decretal paragraph. It is simply unrealistic to expect that I can fully read and digest all the provisions of the loan documents in the few hours those documents are in my possession leading up to the first day hearing. Reciting specific ties between the terms of the order and particular terms or provisions of the loan agreement is something that under most circumstances on the first day I cannot comfortably append my signature to.

3. Given the limited amount of time we have to review the first day motions prior to the hearing and given the substantial amount of paperwork presented, particularly the DIP financing motion with the loan documents and the related order, it is not realistic to have a provision in the order that recites that the Court has "examined" all the loan documents, or that the Court "approves" all the terms and provisions of the loan documents, or language of similar import. An egregious example in this regard reads: "The provisions of the Postpetition Loan Agreement and

other Postpetition Loan Documents are hereby approved and by this reference incorporated herein as a part of this Order." Remember, the Court is authorizing the debtor to borrow money on basic terms that appear reasonable under the expedited circumstances; it is not placing its imprimatur on the multiple terms and conditions of the loan documents.

4. Many of the proposed orders contain lengthy recitations of findings that are preambles to the decretal portion of the order. Given the fact that at most first day hearings only the debtor is heard, it is somewhat presumptuous, and in many cases unduly aggressive, for counsel to hand up an order that sets forth detailed, and in many cases nonessential, findings by the Court regarding prepetition deals, relationships, and understandings of the parties. Most of these findings are based on lengthy recitations in the motion papers. It seems to me, given the limited nature of the first day hearing, that most of these "findings" would better be recited under a heading of "stipulations" between the debtor and the lender. Please note, if the stipulation approach is used, do not put further back in the order a decretal statement that says something to the effect that all the terms and provisions of the subject order constitute an order of the Court. By its nature the order will be acknowledging the stipulations, and of course, appropriate court findings will be a part of the order.

5. The order should not state that parties in interest have been given "sufficient and adequate notice" of the motion. Nine times out of ten this is simply not true. Rule 4001(c)(2) contemplates an expedited hearing with little or no notice (at least not the type of notice that would be sufficient to prepare for an effective participation by third

parties). Consequently, the order should simply recite that the hearing is being held pursuant to the authorization of Rule 4001(c)(2) and recite to whom and when the notice was given.

6. Given the limited nature of the hearing on the first day, the findings that are necessary for the § 364(e) protection afforded the lender can appropriately be expressed in language such as: "Based on the record presented to the Court by the Debtor, it appears that . . . ."

7. Absent exigent circumstances, neither the loan documents nor the order should give the lender a lien position on avoidance actions.

8. While, in order to give the prepetition/postpetition creditor protection typically demanded, it is appropriate for the debtor to acknowledge the validity, perfection, enforceability, and nonavoidability of the prepetition indebtedness and perhaps waive any lender liability claims, this provision should preferably be in the form of a stipulation and should be limited to the debtor so that it is not binding on the estate, the committee, or a trustee. As discussed below, a time limit with respect to nondebtor challenges to the prepetition secured position may be appropriate.

9. Where a DIP financing facility includes the use of the prepetition creditors' cash collateral, adequate protection in the form of a substitute lien on postpetition collateral is appropriate to the extent there is a diminution in the value of the prepetition collateral, but such a provision should not include language such as the following: "[T]he Debtors' use of cash collateral pursuant to this Order or otherwise is hereby deemed to result in a dollar-for-dollar decrease in the value of the Prepetition Collateral . . . ."

10. The debtor's obligation to reimburse the lender for costs and expenses, including attorneys' fees, etc., should be expressed in terms of "reasonable" costs and expenses and such reimbursement obligation should not apply to the lender's defense to challenges by a committee to the lender's prepetition security position.

11. Carveouts for professional fees should not be limited to the debtor's professionals, but should include the professionals employed by any official committee. While the carveout for professionals of any official committee may appropriately exclude work related to the prosecution of an objection to the prepetition secured position of the lender, that exclusion should not encompass any prechallenge investigative work by the professionals.

12. The carveout for committee professionals and the limited period to challenge the lender's prepetition secured position is important. In my view it is the price of admission to the bankruptcy court to obtain the benefits of preserving the assets of the estate, which preservation typically first benefits secured parties.

13. The period of time during which the creditors' committee should have the right to challenge the lenders' prepetition position should generally be at least sixty days from the appointment of the committee. Unless the case is on a fast track, this period should be ninety days.

14. The following provision is patently objectionable:

> Nothing contained in this Order shall be deemed a finding with respect to adequate protection (as that term is described in Section 361 of the Code) of the interest of the Lenders in the Prepetition Collateral, but shall [sic] the Lenders' and security interests in the Prepetition

> Collateral require adequate protection, *Lenders shall be deemed to have requested and shall be deemed to have been granted* such adequate protection as of the Petition Date or such later date when such liens or security interests first were not adequately protected. [Emphasis added.]

15. The following provision is also patently objectionable:

> Notwithstanding anything to the contrary contained in this Order or in any of the Postpetition Agreements, the commitment of the Lenders to make loans, extend credit, and grant other financial accommodations to the Debtors shall *terminate immediately* and automatically, without notice of any kind, *upon the institution by any person or entity of any action seeking to challenge* the validity or priority of (or to subordinate) any of the Lenders' liens or security interests on any of the Prepetition Collateral. [Emphasis added.]

16. I know of no basis for including in a financing order a finding (recently proposed) such as the following: "The Debtor's other secured creditor(s) is/are adequately protected from any adverse consequences which might result from the consummation of the proposed postpetition secured financing between the Debtor and Lender."

17. In reciting the protection afforded the lender by § 364(e), verbose and redundant provisions such as the following are to be avoided. Furthermore, in the following quoted material the underscored language suggests to me that prepetition debt was intended to be afforded the § 364(e) protection. No such effect would be proper.

> If any or all of the provisions of this Order or the DIP Financing Agreement are hereafter modified, vacated or stayed by subsequent order of this Court or by any other court, such stay, modification, or vacation shall not affect the validity of *any debt* to Lender that is or was incurred pursuant to this Order *or that is or was incurred prior to the effective date of such stay, modification, or vacation*, or the validity and enforceability of any lien, security interest or priority authorized or created by this Order or the DIP Financing Agreement and notwithstanding such stay, modification, or vacation, any obligations of the Debtor pursuant to this Order or the DIP Financing Agreement arising prior to the effective date of such stay, modification or vacation shall be governed in all respects by the original provisions of this Order and the DIP Financing Agreement, and the validity of any such credit extended or lien granted pursuant to this Order and the DIP Financing Agreement is subject to the protections afforded under 11 U.S.C. § 364(e). [Emphasis added.]

18. Provisions that operate expressly or as a practical matter to divest the debtor, or any other party in interest, of any discretion in the formulation of a plan are not viewed with favor. I believe the lender can appropriately protect itself without attempting to dictate what may happen with respect to a plan. For example, the lender can certainly include a loan provision calling for repayment in full on the plan's effective date.

19. I often find that the record established at the hearing, either by affidavit or live testimony, is rather thin relative to the detailed findings that the Court is called upon to make. It is important that the affidavit or the live

witness (either by testimony or, if appropriate, by proffer) offered in support of the motion be specific and complete regarding the findings required with respect to §§ 364(c) and (e) and Rule 4001(c)(2).

20. The lifting of the § 362 automatic stay upon the event of a default should be conditioned upon providing three to five business days' notice to the debtor, the U.S. Trustee and any official committee.

21. The order should be worded in a manner that makes it clear that, whatever the terms of the interim order, the Court is not precluded from entering a final order containing provisions inconsistent with or contrary to any of the terms of the interim order, subject, of course, to the lender's § 364(e) protection with respect to monies advanced during the interim period. Just by way of example, should the Court deem it appropriate, given a strong showing at the first day hearing, to allow a waiver of § 506(c), if the subsequently appointed committee presents a persuasive argument, the Court should revisit the matter and be guided by what it hears at the final hearing.

The items discussed above are not intended to be a complete list of the matters that need to be addressed on the issue of first day DIP financing orders. For the most part, they are derived from the latest four or five first day DIP financing orders that I have had before me. If I were to go back over the last few years and review other such orders, I am sure that I could pick out additional provisions that could be considered objectionable.

In any event, I hope that this communication will serve to give counsel sufficient incentive to make the proposed DIP financing orders more palatable while at the same time preserving those elements of the orders that the

lending institutions reasonably believe are essential. Perhaps further dialogue on the matter would be appropriate at a gathering similar to that of the March 11 session.

Very truly yours,

/s/ Peter J. Walsh
Peter J. Walsh

PJW:vw

cc: Chief Judge Joseph J. Farnan, Jr.
Judge Sue L. Robinson
Judge Roderick R. McKelvie
Patricia A. Staiano, United States Trustee